Office of Chief Counsel
Internal Revenue Service

memorandum

CC:SER:GEO:ATL:TL-N-3959-99
CLRountree

date: July 12, 1999

to: District Director, Georgia District
Attention: Mr. Bob DiPrimio
Examination Group 1223
Koger Center, Stop 615-D

from: District Counsel, Georgia District, Atlanta

subject: **Review of Proposed Language for Form 872 related to Potential Tax and Other Items Attributable to Unknown Partnerships**
Taxpayer: [redacted]
E.I.N.: [redacted]
Taxable Year Ended December 31, [redacted]

This is in response to the memorandum dated June 18, 1999 from Revenue Agent Bob DiPrimio requesting our review of proposed language that covers any increases in tax and other items attributable to any partnerships to be inserted in a Form 872 for the consolidated federal income tax return (Form 1120) of [redacted] for the year ended December 31, [redacted].

Based on the following discussion, we have concluded that [redacted] ([redacted]) may execute a valid Form 872 that contains the proposed language for the consolidated Form 1120 liability for the taxable year ended December 31, [redacted] attributable to partnership and affected items, computational adjustments, and partnership items converted to nonpartnership items under I.R.C. §6231 before [redacted]. The proposed language is sufficiently broad to protect the Internal Revenue Service's interest in such items and extend the applicable period for assessment under I.R.C. §6501(a) to an agreed date after [redacted] under I.R.C. §6229(a), §6229(b)(1)(B), §6229(b)(2), §6501(c)(4), and §6501(o)(2).

Issues

I. Whether the applicable limitation period for assessment of tax and other items related to partnerships in which [redacted] and its subsidiaries have interests can be extended through a Form 872 executed by [redacted] within the applicable limitation period for [redacted]'s consolidated Form 1120 for the year ended December 31,

[redacted]. U.I.L.: 6229.02-00; 6229.06-00; 6501.08-00; 6501.08-17

A. Whether the applicable limitation period is governed by I.R.C. §6501 or §6229.

B. Whether [redacted] is a partner under I.R.C. §6231(a)(2) for purposes of execution of a consent to extend the applicable limitation period for assessment.

Facts

[redacted] is the parent corporation of a group of subsidiaries that have properly elected to file consolidated federal income tax returns (Forms 1120) on a calendar year basis.

[redacted] and/or [redacted]'s subsidiaries are partners in a number of partnerships that are subject to the provisions of I.R.C. §6221 through §6234, inclusive (TEFRA). However, we do not know the following six matters for such partnerships for the year ended December 31, [redacted]: (a) the identity of such partnerships; (b) the identity of the corporate subsidiary partners; (c) the status of any partnership as a general or limited partnership; (d) the taxable years of any partnerships that affect [redacted]'s consolidated Form 1120 for the taxable year ended December 31, [redacted]; (e) the due and/or filing dates of the related partnership returns (Forms 1065) for such partnerships; and (f) the status of [redacted] or any of its subsidiaries as general, limited, or tax matters partners of any partnership.

The original due date of [redacted]'s Form 1120 for the year ended December 31, [redacted] was [redacted]. However, [redacted] secured an extension to file (Form 872) such return until [redacted]. Under the provisions of I.R.C. §7405, such extended due date was [redacted]. Consequently, without a valid extension, the general three-year period for assessment of tax related to such Form 1120 will expire on [redacted]. See Brown v. United States, 391 F.2d 648, 656 (Ct. Cl. 1968); Rev. Rul. 81-269, 1981-2 C.B. 243, 244

However, by [redacted], [redacted] and the Internal Revenue Service's Examination Division executed a Form 872 to extend such three-year period until [redacted].

The executed Form 872 in the possession of the Internal Revenue Service (Service) does not specifically address any items that are related to partnerships that are subject to the TEFRA. To specifically protect the Service's right to assess any tax or other items related to partnerships that are subject to TEFRA, the Service's Examination Division seeks to secure an additional Form 872 that includes the following language before [redacted]:

> Without otherwise limiting the applicability of this agreement, this agreement also extends the period of limitations for assessing any tax (including additions to tax and interest) attributable to any partnership items (see section 6231(a)(3)), affected items (see section 6231(a)(5)), computational adjustments (see section 6231(a)(6)), and any partnership items converted to nonpartnership items (see section 6231(b)). This agreement extends the period for filing a petition for adjustment under section 6228(b), but only if a timely request for administrative adjustment is filed under section 6227. For partnership items that have converted to nonpartnership items, this agreement extends the period for filing a suit for refund or credit under section 6532, but only if a timely claim for refund is filed for such items. In accordance with paragraph (1) above, an assessment attributable to a partnership shall not terminate this agreement for other partnerships or for items not attributable to a partnership. Similarly, an assessment not attributable to a partnership shall not terminate this agreement for items attributable to a partnership.

We understand that the proposed language already has been approved by the Office of Chief Counsel (Chief Counsel) and that the Service's Examination Division does not intend to have [redacted] or any of its subsidiaries sign the additional Form 872 as the tax matters partner of or any other authorized representative of any partnership.

The Service's employees handling the examination of [redacted]'s Form 1120 for the year ended December 31, [redacted] probably will not determine the identity of any currently unknown TEFRA partnerships or subsidiaries that are affected partners or conduct any examination related to Forms 1065 of unknown partnerships.

We do not know the extent of any potential tax or other items or the proposed extended limitation period.

There are no known applicable exceptions to the rules of the

parent corporation's common agency or several liability under the consolidated return regulations for [redacted] and its subsidiaries.

Legal Discussion

Except as otherwise provided in the provisions of I.R.C. §6501, the maximum date for assessment of income tax for a taxable year is within three years after the taxpayer files the related return. I.R.C. §6501(a). However, such general rule is subject to at least two relevant exceptions.

The first exception is the extension of the maximum date by the provisions of I.R.C. §6501(c)(4) allowing a taxpayer and the Service to extend such three-year period through the execution of a written agreement before the expiration of such three-year period. The second exception is created by the reference in I.R.C. §6501(o)(2) (in effect for the taxable year ended December 31, [redacted]) to the provisions of I.R.C. §6229 for extensions related to partnership items defined in I.R.C. §6231(a)(3).

Except as otherwise provided in I.R.C. §6229, the period for assessing any income tax with respect to any person that is attributable to any partnership item or affected item for a partnership taxable year generally does not expire before the date that is three years after the later of (1) the date on which the partnership return for such taxable year was filed; (or) the last date for filing the return (determined without regard to extensions). I.R.C. §6229(a). However, such period may be extended as follows:

a. With respect to any partner, by an agreement entered between such partner and the Service.

b. With respect to all partners, by an agreement entered between the Service and the tax matters partner or any other person authorized by the partnership in writing to enter such an agreement.

I.R.C. §6229(b)(1)(A) and §6229(b)(1)(B).

In addition, any agreement under I.R.C. §6501(c)(4) shall apply with respect to the period specified in I.R.C. §6229(a) only if the agreement expressly provides that such agreement applies to tax attributable to partnership items. I.R.C. §6229(b)(3). The Service has successfully defended a consent under I.R.C. §6501 that specifically modified the consent to cover tax attributable to partnership items in accordance with the provisions of I.R.C. §6229(b)(2). See Foam Recycling Associates v. Commissioner, T.C. Memo 1992-645, aff'd in

unpublished opinion, 159 F.3d 1346 (2d Cir. 1998) (Form 872-A executed by limited partner in TEFRA partnership).

Coordination with Consolidated Return Provisions

A partner within the meaning of I.R.C. §6229 includes both (a) a partner in a partnership and (b) any other person whose income tax liability is determined in whole or in part by taking into account directly or indirectly partnership items of the partner. I.R.C. §6231(a)(2)(A) and §6231(a)(2)(A). A person includes a corporation. I.R.C. §7701(a)(1).

The tax liability of each member of an affiliated group is determined in whole and in part by taking into account directly and indirectly any partnership item of any member of the affiliated group that contributes to the group's consolidated taxable income and the separate taxable income for each member of the affiliated group under Treasury Regulations §1.1502-2, §1.1502-11(a), and §1.1502-12. In addition, the common parent corporation and each subsidiary that was a member of the affiliated group during any part of the consolidated return year generally is severally liable for the entire consolidated income tax, including income tax deficiencies, for such year computed under the Treasury Regulations applicable to consolidated returns. Treas. Reg. §1.1502-6(a); J&S Carburetor Co. v. Commissioner, 93 T.C. 166, 168 - 169 (1989); Globe Products Corp. v. Commissioner, 72 T.C. 609, 617 - 620 (1979), acq. 1980-1 C.B. 1; Entertainment Systems, Inc. v. Commissioner, T.C. Memo 1995-401. Consequently, the parent corporation of an affiliated group is a partner through its direct ownership of a partnership interest or through its ownership interest of a subsidiary that is the actual owner of a partnership interest under I.R.C. §6231(a)(2).

The common parent of the affiliated group of corporations generally is the sole agent for each subsidiary in the group and no subsidiary has authority to represent itself in any tax matter (the common agency rule). Treas. Reg. §1.1502-77(a); Union Oil Co. of California v. Commissioner, 101 T.C. 130, 135 - 138 (1993); Insilco Corp. v. Commissioner, 73 T.C. 589, 595 - 596 (1979), aff'd in unpublished opinion, 659 F.2d 1059 (2d Cir. 1981), acq. in result 1987-1 C.B. 1 - 2 n. 6. As such sole agent, the common parent is duly authorized to act in its own name in all matters related to the tax liability for the consolidated return year. Treas. Reg. §1.1502-77(a); J&S Carburetor Co., 93 T.C. at 169; Entertainment Systems, Inc., T.C. Memo 1995-401. Consequently, with exceptions that are not applicable to this case, no subsidiary has authority to act for or represent itself in any matter related to the tax liability of the consolidated group. Treas. Reg. §1.1502-77(a).

Matters over which the common parent has sole authority to act include applications for all extensions of time and the execution of waivers. Treas. Reg. §1.1502-77(a). When the common parent performs one of such acts, the act is considered as having also been performed by each member of the consolidated group. Treas. Reg. §1.1502-77(a).

Service's Position on Applicability of Limitation Provisions of I.R.C. §6501 and §6229

TEFRA created unified audit and litigation procedures, including the limitation period under I.R.C. §6229 for assessment of tax and other items related to partnerships subject to such provisions. However, TEFRA and related changes to I.R.C. §6501 have never contained any language that changed the treatment of a partnership as a nontaxable conduit, the reporting of tax by individual partners based on distributive shares of partnership items on the partners' separate tax returns, or the assessment of the tax related to such items against partners and not the partnership. In addition, TEFRA did not specifically repeal the applicability of the assessment period under I.R.C. §6501 to tax from partnership items or the ability of the Service and a partner to extend such limitation period for only that partner's tax and other items attributable to or affected by that partner's share of partnership items that had to be reported on the partner's income tax return for any taxable year. The legislative history and the provisions set forth in I.R.C. §6229(b)(1)(B) for individual partners and the coordination provisions of I.R.C. §6229(b)(2) reflect that such ability was specifically retained. See H.R. Conf. Rep. No. 760, 97th Cong, 2d Sess. (1982), 1982-2 C.B. 600, 662, 665.

In addition, the reference in I.R.C. §6501(o) to I.R.C. 6229 for only extensions of the applicable limitation period under I.R.C. §6501 reflects that the limitation period under I,R.C. §6501 may be open without regard to the provisions of I.R.C. §6229. Such would be the case when a taxpayer-partner fails to file its income tax return under I.R.C. §6501(c)(3) or a partnership return was filed and due before the filing and due dates of an income tax return and the Service and the taxpayer take no action to extend the applicable limitation period.

Furthermore, in 1993, the Supreme Court specifically held that the limitation period under I.R.C. §6501 for a taxpayer is the specific taxpayer's return and not the return of another taxpayer from whom the taxpayer has received an item. See Bufferd v. Commissioner, 506 U.S. 523, 527, 533 (1993). Finally, although specifically not applicable to the taxable year ended December 31, [redacted], the Taxpayer Relief Act of 1987 clarified that

the applicable statute of limitation for items from partnerships commences running based on the taxpayer-partner's return and not the return of the partnership from whom the taxpayer-partner received an item of income, gain, loss, deduction, or credit. See H.R. Conf. Rep. 220, 105th Cong., 1st Sess. 702 - 703 (1997), reprinted in 1997 U.S.C.C.A.N. 1129, 1514 - 1515.

Despite the lack of any language repealing the applicability of I.R.C. §6501 and the reference to extension of the limitation period in I.R.C. §6501(o) and the ability of individual partners to extend limitation periods for items attributable to their partnership items, and coordination with I.R.C. §6501(c)(4) in I.R.C. §6229(b)(2), pre-Bufferd reported decisions that deal with the applicable limitation period for tax associated with TEFRA partnership items created a conflict as to the applicability of the provisions of I.R.C. §6229 and/or §6501 for determining the limitation period for assessment of tax and other items related to adjustments of partnership items of partnerships subject to TEFRA.

Some pre-Bufferd decisions specifically have held that I.R.C. §6501(a) does not apply to income tax attributable to partnership items. See Boyd v. Commissioner, 101 T.C. 365, 370 (1993); Cambridge Research and Development Group v. Commissioner, 97 T.C. 287, 292 (1991). Such decisions used I.R.C. §6501(o) for authority for such holding, but glossed over the reference in I.R.C. §6501(o) to I.R.C. §6229 for purposes of an extension to the period of I.R.C. §6501 for partnership items and the failure of any provision of either I.R.C. §6501 or §6229 to repeal the applicability of I.R.C. §6501 to partnerships items.

Without appearing to examine the references to I.R.C. §6229 in I.R.C. §6501(o) for extensions related to partnership items and to I.R.C. §6501(c)(4) in I.R.C. §6229, other pre-Bufferd decisions hold that the provisions of I.R.C. §6229 govern the limitation periods independent of 6501. See In re Frary, 117 B.R. 541, 545 (Bankr. D. Alaska 1991); Metals Refining Ltd. v. Commissioner, T.C. Memo 1993-115; Lumentics v. Commissioner, T.C. Memo 1992-630.

However, other decisions appear to recognize that the provisions of both I.R.C. §6501(a) and §6229 are interdependent and apply to assessment periods for tax attributable to partnership items based on the following factors:

a. The provisions of I.R.C. §6501(n)(2) that refer to the provisions of I.R.C. §6229 for extension of the period in the case of partnership items as defined in I.R.C. §6231(a)(3) and the coordination between I.R.C. §6501(c)(4)

§6229 discussed in I.R.C. §6229(b)(3). See Wayne Caldwell Escrow Partnership v. Commissioner, T.C. Memo 1996-401 (appeal by taxpayer in 5th Cir. November 4, 1986); O'Rourke v. Commissioner, T.C. Memo 1997-152; Williams v. United States, 974 F. Supp. 1206, 1210 (C.D. Ill. 1997).

b. The view that the language of I.R.C. §6501(a) provides a maximum or ending period for assessment based on the use of "shall be assessed within" and that the language of I.R.C. §6229(a) lacks an ending date or provides a minimum period for assessment that may expire after the specified period based on the use of "shall not expire before". See Manas v. Commissioner, T.C. Memo 1992-454; Crnkovich v. United States, 81 AFTR2d 98-2399 n. 7 (Fed. Cl. 1998).

c. The view that the provisions of I.R.C. §6229 extend or suspend the limitation period of limitation set forth in I.R.C. §6501. See In re Madden, 96-1 U.S.T.C. ¶50,263 (Bankr. D.N.J. 1996); Crnkovich, 81 AFTR2d 98-2399 n. 7; Estate of Quick v. Commissioner, 110 T.C. 172, 181 - 182 (1998).

Based on the decisions that recognize that the provisions of both I.R.C. §6501(a) and §6229 are interdependent and apply to assessment periods for tax attributable to partnership items, the Supreme Court's decision in Bufferd, and the 1997 legislative clarification, the Service's position is that the provisions of I.R.C. §6229 are not the exclusive provisions for the applicable limitation period, but only set forth a minimum assessment period that serves to extend the general assessment period of I.R.C. §6501.

(b)(7)e [redacted] (b)(7)e [redacted] (b)(7)e .

Issue A - Application of Law to Facts

Under the provisions of I.R.C. §6501(c)(4), §6501(o)(2), §6229(b)(2)(B), and §6229(b)(3), the three-year limitation period for tax, additions to tax, and interest attributable to items related to TEFRA partnerships in which [redacted] and its subsidiaries had any interests for the year ended December 31, [redacted] can be extended after [redacted] by a Form 872 executed before [redacted] that covers tax attributable to partnership and affected items, computational adjustments, and partnership items converted to nonpartnership items under I.R.C. §6231. The

proposed language, which has previously been approved by Chief Counsel, is sufficiently broad to protect such items for any partnership and extend the applicable period for assessment I.R.C. §6501(a) to an agreed date after [redacted] under I.R.C. §6229(a), §6229(b)(1)(B), §6229(b)(2), §6501(c)(4), and §6501(o)(2).

There are no known facts that would preclude the Service's assertion of its position on the applicable statutory provisions and limitation period in this case.

Issue B - Application of Law to Facts

[redacted] is the proper person to execute a binding consent to extend the applicable limitation period for assessment of tax and other items related to partnership items attributable to [redacted] or any subsidiary for two reasons. First, regardless of whether [redacted] is a partner itself or through its interests in the subsidiaries, [redacted] is a partner under I.R.C. §6231 because the tax liability of [redacted] and each [redacted] subsidiary is determined in part by taking into account directly and indirectly any partnership item of any member of the affiliated group that contributes to the group's consolidated taxable income and the separate taxable income for each member of the affiliated group under Treasury Regulations §1.1502-2, §1.1502-6(a), §1.1502-11(a), and §1.1502-12. Second, [redacted], as the common parent, is the sole entity that may execute the required consent. See Treas. Reg. §1.1502-77(a); Union Oil Co. of California, 101 T.C. 130, 135 - 138 (1993); Insilco Corp., 73 T.C. 589, 595 - 596; J&S Carburetor Co., 93 T.C. at 169.

Conclusion

[redacted] and the Service may execute an additional Form 872 that contains the proposed language for the portion of [redacted]'s consolidated Form 1120 liability for the taxable year ended December 31, [redacted] attributable to partnership and affected items, computational adjustments, and partnership items converted to nonpartnership items under I.R.C. §6231 before [redacted]. Such consent will be valid to protect the Service's interest with respect to matters attributable to such items under I.R.C. §6231.

Because no further action is required by this office, we are closing our file.

If you have any questions, please contact me at 404/338-7943.

Carolyn Lee Rountree

CAROLYN L. ROUNTREE
Special Litigation Assistant

cc: TL Cats

cc: Mr. Roy Allison
Assistant Regional Counsel (TL)
Southeast Region
Room 2110, Stop 180-R